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IN THE
SUPREME COURT OF THE UNITED STATES

Alexander S. McMath, an individual,
Petitioner,

v.

Alva M. Montgomery, an individual;
Patsy Patterson, an individual, and
The Estate of Clarence C. Montgomery,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employee Retirement and Income Security Act (ERISA) of 1974 preempts California's state law doctrine of substantial compliance as applied to a change of beneficiary provision of an ERISA plan.

PARTIES TO THE PROCEEDING

Petitioner

Alexander S. McMath, an individual. Petitioner is an individual and has no corporate affiliations.

Respondents

Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW viii

JURISDICTION x

STATUTORY PROVISION INVOLVED x

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

A - The Court of Appeals decision conflicts with the Fourth Circuit's holding in Phoenix Mutual, the Sixth Circuit's decision in McMillan, and the Ninth Circuit's prior decision in Fortis, and aggravates the existing split of authority over interpretation of 29 U.S.C. § 1144(a) 7

B - The Decisions of the Court of Appeals is erroneous 11

C - The issue of ERISA preemption of state substantial compliance laws is an important question of federal law which has not been, but should be, settled by this Court 14

CONCLUSION 16

APPENDIX

APPENDIX A
Ninth Circuit Court of Appeals Opinion, 3/13/00 . . . . . 1a

APPENDIX B
District Court Amended Order, 8/6/98 . . . . . 24a

APPENDIX C
District Court Order and Judgment, 7/20/98 . . 36a

APPENDIX D
Ninth Circuit Court of Appeals Order, 5/16/00 . . . . . 49a

TABLE OF AUTHORITIES

Cases: **Page**

Alessi v. Raybestos-Manhattan,
451 U.S. 504 (1981) 12

Aloha Airlines v. Ahue,
12 F.3d 1498 (9th Cir. Haw. 1993) 6

BankAmerica Pension Plan, et al. v. Alexander S. McMath, et al., 2000 US App. Lexis 2835; 206 F.3d 821 (9th Cir. Cal. 2000) viii

BankAmerica Pension Plan, et al. v. Alexander S. McMath, et al., 1998 US Dist. Lexis 11217 . . . . . viii, ix

California Div. of Labor Standards Enforcement v. Dillingham Const. N.A., Inc., 519 U.S. 316 (1997) 5, 8

Continental Assurance Co. v. Coombes,
2000 U.S. Dist. LEXIS 810 (2000) 9

Cripps v. Life Ins. Co. of North America,
980 F.2d 1261 (9th Cir. Cal. 1992) 4

DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997) . . . 8, 11, 12

Emard v. Hughes Aircraft Co.,
153 F.3d 949, 957 (9th Cir. Cal. 1998) 5

Fort Halifax Packing Co., Inc. v. Coyne,
482 U.S. 1 (1987) 11, 12

Fortis Benefits Ins. Co. v. Johnson,
966 F.Supp. 987 (D.C. Nev. 1997), affirmed,
152 F.3d 925
(9th Cir. Nev. 1998) . . . . . 4, 6 , 7, 8, 10, 11, 12

McMillan v. Parrot,
913 F.2d 310 (6th Cir. Ky. 1990) . . . 7, 9, 11, 14

Metropolitan Life Insurance Co. v. Hanslip,
939 F.2d 904 (10th Cir. Ok. 1991) 9, 10

Moore v. Philip Morris Companies, Inc.,
8 F.3d 335 (6th Cir. Ky. 1993) 11

New York State Conference of Blue Cross & Blue Shield
Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 11

Peckham v. Gem State Mutual of Utah,
964 F.2d 1043 (10th Cir. Utah 1992) 7, 8

Phoenix Mutual Life Ins. Co. v. Adams,
30 F.3d 554, 560-561
(4th Cir. S.C. 1994) 3, 4, 5, 6, 7, 9, 10

Pilot Life Ins. v. Dedeaux,
481 U.S. 41 (1987) 9, 13, 15

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 6, 12

Statutes:

Electronic Signature in Global and
National Commerce Act 13

29 U.S.C. §1104(a)(1)(D) 14

28 U.S.C. §1254(1) 10

28 U.S.C. §2101(c) 10

Rules:

SC Rule 10.1(a) 11

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in BankAmerica Pension Plan, an employee benefit plan; BankAmerica 401(K) Investment Plan, an employee benefit plan, Plaintiffs, v. Alexander S. McMath, an individual, Defendant-Appellee, v. Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery, Defendants-Appellants, 2000 US App. Lexis 2835 (9th Cir. 3/13/2000), 206 F.3d 821 (9th Cir. Cal. 2000), is set forth in Appendix A hereto.

The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing filed by Defendant-Appellee, Alexander S. McMath, in BankAmerica Pension Plan, an employee benefit plan; BankAmerica 401(K) Investment Plan, an employee benefit plan, Plaintiffs, v. Alexander S. McMath, an individual, Defendant-Appellee, v. Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery, Defendants-Appellants, (9th Cir. 5/16/2000) is set forth in Appendix B hereto.

The Order of the District Court for the Northern District of California Granting Alexander McMath's Motion for Summary Judgment and Denying Cross-Motion of Summary Judgment in BankAmerica Pension Plan, an employee benefit plan; BankAmerica 401(K) Investment Plan, an employee benefit plan, Plaintiffs, v. Alexander S. McMath, an individual, Defendant, v. Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery, Defendants, is reported at 1998 US Dist. Lexis 11217, and set forth in Appendix C hereto.

The Amended Order of the District Court for the Northern District of California Granting Alexander McMath's Motion for Summary Judgment and Denying Cross-Motion of Summary Judgment in BankAmerica Pension Plan, an employee benefit plan; BankAmerica 401(K) Investment Plan, an employee benefit plan, Plaintiffs, v. Alexander S. McMath, an individual, Defendant, v. Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery, Defendants, is reported at 1998 US Dist. Lexis 11217, and set forth in Appendix D hereto.

The Judgment of the District Court for the Northern District of California entered in favor of defendant McMath and against defendants Montgomery, et al. in BankAmerica Pension Plan, an employee benefit plan; BankAmerica 401(K) Investment Plan, an employee benefit plan, Plaintiffs, v. Alexander S. McMath, an individual, Defendant, v. Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery, Defendants, is reported at 1998 US Dist. Lexis 11217, and set forth in Appendix E hereto.

BASIS FOR JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing filed by Defendant-Appellee, Alexander S. McMath, in BankAmerica Pension Plan, an employee benefit plan; BankAmerica 401(K) Investment Plan, an employee benefit plan, Plaintiffs, v. Alexander S. McMath, an individual, Defendant-Appellee, v. Alva M. Montgomery, an individual; Patsy Patterson, an individual; and The Estate of Clarence C. Montgomery, Defendants-Appellants, was filed on May 16, 2000; and this petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The focus of this petition for certiorari is ERISA Section 504(a), 29 U.S.C. §1144 (a), which provides as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

This Statement sets forth the pertinent facts and findings of the Court of Appeals as set out in its opinion as contained in Appendix A hereto, inasmuch as there is no dispute respecting the controlling facts, to wit:

"Clarence C. Montgomery ("Mr. Montgomery") worked at Bank of America from approximately 1990 until his death in November 1996. This ... dispute is over the proceeds to the 401(k) Plan that Mr. Montgomery accumulated while working for Bank of America. In 1990, Mr. Montgomery submitted a beneficiary designation form for the 401(k) Plan designating three primary beneficiaries: Alva Montgomery (his mother), Clarence H. Montgomery (his father), and Patsy Patterson (his sister). In March 1996, an unsigned beneficiary form was submitted for the 401(k) Plan, naming Mr. McMath as the primary beneficiary and Alva Montgomery as the contingent beneficiary. The 401(k) Plan accepted the form but failed to notice that it had not been signed.

"After Mr. Montgomery's death in 1996, the 401(k) Plan realized the omission and informed both Mr. McMath and (Alva Montgomery, et al.). Mr. McMath and (the Montgomerys) subsequently attempted but were unable to reach an agreement on a division of the proceeds of the 401(k) Plan. In March 1997, both asserted claims to the 401(k) Plan. In April 1997, the 401(k) Plan claims administrator determined that the unsigned beneficiary form was valid, and that Mr. McMath was entitled to the 401(k) Plan benefit. (The Montgomerys) appealed pursuant to the 401(k) Plan appeal procedures and in August 1997, the 401(k) Plan's Administrative Committee upheld the decision of the claim's administrator and denied the appeal.

"The Plans filed an interpleader action under the Employee Retirement Income Security Act of 1974 (ERISA) and Federal Rule of Civil Procedure 22 to resolve the parties' respective positions in the dispute. In February 1998, the district court discharged the Plans from the action and released them from all liability to the claimants. Thereafter, Mr. McMath and (the Montgomerys) filed cross motions for summary judgment and on July 22, 1998, the district court found that there were no genuine issues of material fact and ruled in favor of Mr. McMath.

"The district court's ruling was based on the following findings: (1) Mr. Montgomery contacted the plan and requested the change of beneficiary form; (2) Mr. Montgomery then filled out the form and returned it, neglecting only to sign it; (3) Mr. Montgomery was deprived of the opportunity to sign the form because the plan's Service Center failed to return it to him for completion, in contravention of its standard policy to do so upon the receipt of unsigned forms; instead, (4) the Service "Center filed the unsigned form as an effective change of beneficiary; and (5) the 401(k) Plan's fiduciary had discretion to determine eligibility for benefits and it exercised its discretion reasonably. In determining that the fiduciary had not abused its discretion, the district court found that: (1) ERISA preempted the state doctrine of substantial compliance; (2) a federal common law doctrine of substantial compliance applied; and (3) under the federal common law doctrine of substantial compliance, Mr. Montgomery effectively designated Mr. McMath as his beneficiary." Pgs. 2a-4a, McMath Opinion (3/13/2000), Appendix A.

On appeal the Court of Appeals found that the district court "did err in that it should have applied California law rather than federal common law" on the issue of substantial

compliance. And, since "under California law, Mr. Montgomery did not substantially comply with the 401(k) Plan's beneficiary designation requirements," the Court of Appeals reversed the decision of the district court. Pg. 22a, Ibid.

The Court of Appeals decision began its inquiry with the finding that the Plan's Administrative Committee "was not given the discretion to waive the signature requirement" under the plan despite the plan's language that the "Administrative Committee shall have discretionary authority to determine eligibility for benefits and to construe the terms of the Plan." Pgs. 12a-13a, Ibid. Relying upon the language of the Plan that "neither the Committees nor any of their members shall have the power to add to, subtract from or modify any of the terms of the plan (emphasis in opinion)", the Court of Appeals concluded that the Committee "did not have the discretion to 'subtract from or modify' the requirement that a Beneficiary Designation Form be signed." Pg. 13a, Ibid.

Notwithstanding, the Court of Appeals admitted that it was not bound by the limits upon the Administrative Committee's discretion, but were empowered "to employ the equitable doctrine of substantial compliance, which is intended to circumvent harsh results 'engendered by a formalistic, overly technical adherence to the exact words of the change of beneficiary provision in a given policy'," citing Phoenix Mutual Live Insurance Co. v. Adams, 30 F.3d 554, 563 (4th Cir. 1994). Pg. 13a, Ibid. The question then arose as to whether the federal or state doctrine of substantial compliance would apply in view of the preemptive language of 29 U.S.C. §1144(a) that "any and all State laws insofar as they ... relate to any employee benefit plan" are preempted by ERISA. Pg. 14a, Ibid.

However, it was at this juncture that the Court of Appeals put itself at cross purposes with the district court when it opted to adopt California's doctrine of substantial compliance over the federal standard, which brings the case to this Court. While first observing that "whether ERISA preempts a state substantial compliance doctrine is a question of first impression in this circuit," the Court of Appeals rejected the application of the federal law of substantial compliance as adopted in the Fourth Circuit (Phoenix Mutual Life Insurance Co., supra.)[1]

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[1] Predating the filing of the Court of Appeals opinion on March 3, 2000, the Court had previously affirmed without opinion the District Court's opinion in Fortis Benefits Ins. Co. v. Johnson, 966 F.Supp. 987 (D.C. Nev. 1997); affirmed, 152 F.3rd 925 (1998), the District Court was confronted with a factual situation substantially identical to the instant case, viz., a change of beneficiary designation. Ibid. at 989. In Fortis it was required that "a beneficiary designation and any change in designation must be filed in writing with the Administrator on a properly completed form and will become effective only when appeared and recorded by the Administrator." Ibid. The insured in Fortis, a Michael Johnson, sent a handwritten letter to the insurance company indicating his desire to change his designated beneficiary to a Ms. Geraldine Johnson; however, Mr. Johnson failed to submit a "signed change of beneficiary form" to this effect because of the company's apparent failure to send him the form. Ibid. Under these circumstances, as herein, it was the contention of the newly "designated" beneficiary, Ms. Geraldine Johnson, that since "there has been substantial compliance with requirements for change of beneficiary, technical defects in change of beneficiary notice should not defeat the intent of the insured." Ibid.

While sustaining Ms. Johnson's arguments in this regard, the District Court noted at footnote three of its opinion that:
"If this case had been brought by either of the claimants, rather than the insurance company, see Cripps v. Life Insurance Company of North America, 980 F.2d 1261 (9th Cir. 1992), the contract claims would be governed by ERISA. The result would be the same. The substantial compliance doctrine in the change of beneficiary context is part of the federal common law of ERISA. See: Phoenix Mutual Life Insurance Company v. Adams, 30 F.3d

Citing this Court's holding in California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc., 519 U.S. 316, 324 (1997), and the Ninth Circuit's decision in Emard v. Hughes Aircraft Co., 153 F.3d 949, 957 (9th Cir. Cal. 1998), the Court of Appeals concluded that the Supreme Court "recognizes that the ERISA preemption analysis provides that a law 'relates to' an employee benefit plan if it has (1) a 'reference to' or (2) a 'connection with' an ERISA Plan. Pg. 16a, Ibid. While admitting to "the unhelpful text [of Section 1144(a)]and the frustrating difficulty of defining its key term ['relate to'], the Court of Appeals held that its decision would turn on the distinction recognized in Hughes Aircraft, viz., the application of "laws that affected the administration of the plans and those that merely affected the ultimate ownership of the distributed benefits." Pg. 17a, Ibid.

Under the Hughes approach, the Court of Appeals in this case concluded that "in this case the state law doctrine of substantial compliance would not affect the administration of the plan; [r]ather, it would aid in determining the identity of the proper recipient of the proceeds," holding that the "burden on the administrator resulting from applying state substantial compliance law would be slight and is not enough to overcome the presumption against preemption." Pgs. 17a-18a, Ibid.

554, 565 (4th Cir. 1994) .... "An insured substantially complies with the change of beneficiary provisions of an ERISA life insurance policy when the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy. Phoenix, at 564.

In reaching its conclusion that application of California's substantial compliance doctrine did not "relate to" the administration of the BankAmerica Plan, the Court of Appeals relied upon the criteria it previously set forth in its decision in Aloha Airlines v. Ahue, 12 F.3d 1498, 1504 (9th Cir. Haw. 1993), to wit: "(1) whether the state law regulates the types of benefits of ERISA employee benefit plans; (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law; (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee." Pg. 18a, Ibid. Since, in the Court of Appeals' view, none of these factors were involved, it concluded that the "connection" of California's substantial compliance law with ERISA was too "tenuous, remote, or peripheral" to require preemption, citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, (1983). Pg. 18a, Ibid.

The Court of Appeals terminated its opinion by finding that the application of California's doctrine of substantial compliance required a finding that "Mr. Montgomery did not substantially comply with the beneficiary designation requirements of the 401(k) Plan by signing the designation form." Pg. 22a, Ibid.

REASONS FOR GRANTING THE WRIT

As the Ninth Circuit has acknowledged, its decision in this case: (1) conflicts with the Fourth Circuit's decision in Phoenix Mutual, supra., not to mention its previous decision in Fortis, supra.; (2) the Court is confused and perplexed by "the unhelpful text and the frustrating difficulty of defining ...

'relate to'" within the context of 29 U.S.C. §1144(a); and (3) the Tenth Circuit's decision in Peckham v. Gem State Mutual of Utah, 964 F.2d 1043, 1051 (10th Cir. Ok. 1992), is contrary to the Fourth Circuit's and aligned with the Ninth Circuit's analysis of the preemption issue.

Given these admissions on the face of its opinion, the instant petition would provide the Supreme Court with an opportunity to rectify the split between the Circuits on the preemptive effects of ERISA upon state substantial compliance laws while at the same time giving guidance to the federal courts on the appropriate interpretation of the preemptive language of 29 U.S.C. 1144(a). Moreover, in this respect, the Ninth Circuit's analysis of the preemptive language of 29 U.S.C. §1144(a) is incorrect, thereby invalidating its decision; and, finally, the resolution of the issue of federal/state substantial compliance law is critical to the administration of the ERISA statutory scheme.

A - The Court of Appeals' decision conflicts with the Fourth Circuit's holding in Phoenix Mutual, the Sixth Circuit's decision in McMillan, and the Ninth Circuit's prior decision in Fortis, and aggravates the existing split of authority over interpretation of 29 U.S.C. § 1144(a).

At the outset it should be noted that the Court of Appeals' decision rejecting application of the federal law doctrine of substantial compliance differs with the Fourth Circuit's holding in Phoenix Mutual Life Insurance Co. v. Adams, 30 F.3d 554, 563 (4th Cir. S.C. 1994), the Sixth Circuit's holding in McMillan v. Parrot, 913 F.2d 310, 311 (6th Cir. Ky. 1990), and with that previously adopted by the Ninth Circuit in dictum in Fortis Benefits Ins. Co. v. Johnson,

supra. at fn. 1.

Herein, the Court of Appeals chose a conflicting path that it believed was compelled by this Court's decision in California Division of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc., 519 U.S. 316 (1997), decided the year previous to the Ninth Circuit's decision in Fortis, and set about to determine whether the doctrine of substantial compliance had a "connection with" an ERISA plan. McMath at pg. 16a. This "connection" determination, according to the Court of Appeals, turned on a two prong test, to wit, (1) "the scope of the state law that Congress understood would survive;" and (2) "the nature of the effect of the state law on ERISA Plans." McMath at 17a., quoting Dillingham.[2]

The Court of Appeals declined to define the scope of the state's law of substantial compliance that Congress "understood would survive," and went directly to the second prong to conclude that California's law of substantial compliance "would not affect the administration of the plan ... (but) ... would aid in determining the identity of the proper recipient of the proceeds," holding that "the burden on the administrator resulting from applying state substantial compliance law would be slight and is not enough to overcome the presumption against preemption." McMath at 17a. In this regard, the Ninth Circuit sided with the opinion of the Tenth Circuit in Peckham v. Gem State Mutual of Utah, 964 F.2d 1043 (10th Cir. Utah 1992), wherein the

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[2] As will hereafter be seen, the Ninth Circuit's reliance on Dillingham was somewhat tardy in light of this Court's subsequent decision in DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 117 S.Ct. 1747, 520 U.S. 806, 138 L.Ed.2d 21 (1997), which latter decision favors the approaches of the Fourth and Sixth Circuits in effectuating Congressional intent under 29 U.S.C. 1144(a).

Tenth Circuit found that the "doctrine of substantial compliance does not denigrate from an ERISA plan in a way that is significant enough to implicate the concerns underlying ERISA preemption," holding that "ERISA does not preempt the state common law doctrine of substantial compliance." Ibid. at 1052

However, the Fourth Circuit came to an opposite conclusion regarding the impact and connection of a state's substantial compliance doctrine on ERISA plans. In Phoenix Mutual, the Fourth Circuit adopted the language of its lower district court to the effect that since "the doctrine of substantial compliance involves the determination of which of two or more purported beneficiaries will receive the proceeds of a life insurance policy," it must "relate to" and have a "connection" with a plan, citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41,47-48 (1987). Phoenix Mutual at 560. According to the Fourth Circuit, such a result is consistent with the findings of other federal courts that "generally the designation of a beneficiary of an ERISA Plan ... 'plainly relates' to the ERISA plans," citing Metropolitan Life Insurance Co,. v. Hanslip, 939 F.2d 904, 906 (10th Cir. Ok.1991) and the Sixth Circuit's decision in McMillan v. Parrot, 913 F.2d 310, 310 (6th Cir. Ky. 1990. Phoenix Mutual at 560.

This split in the circuits was recently highlighted in an ERISA action in the Northern District of Illinois, Eastern Division, in the matter of Continental Assur. Co. v. Coombes, 2000 U.S. Dist. LEXIS (Nos. 98-C-1153, 98-C-4771, 98-C-7186), involving an unsigned beneficiary designation and application of the substantial compliance rule. The district court in Continental Assur. Co. followed the rule of federal preemption as set forth in Phoenix Mutual, observing as follows:

> There is a threshold issue of whether Linda's claim of substantial compliance is preempted by ERISA. ERISA preempts any state law that "relates to" a plan. It is undisputed that the Reliance policy is part of a plan. Thus, the question is whether the doctrine of substantial compliance "relates to" the Reliance policy. Two circuits have been faced with the question of whether substantial compliance is preempted by ERISA. See: Phoenix Mutual Life Insurance Co. v. Adams, 30 F.3d 554 (4th Cir. 1994) (finding that ERISA preempts state law doctrine of substantial compliance); compare: Peckam v. Gem State Mutual of Utah, 964 F.2d 1043 (10th Cir. 1992) (finding that doctrine of substantial compliance does not modify an ERISA plan and is, therefore, not preempted). District courts outside the Tenth Circuit have found the reasoning of Phoenix Mutual to be the most persuasive. See: Metropolitan Life Insurance Co. v. Hall, 9 F.Supp.2d 560 (D.C. Md. 1998); Fortis Benefits Insurance Co. v. Johnson, 966 F.Supp. 987 (D.C. Nev. 1997); First Capital Life Insurance Co. v. AAA Communications, Inc., 906 F.Supp. 1546 (D.C. Ga. 1995). This court adopts the reasoning of Phoenix Mutual and finds that ERISA preempts the state doctrine of substantial compliance. Pg. 6, 2000 U.S. Dist. LEXIS 810.

In sum, the Ninth Circuit's application of the preemptive provisions of 29 U.S.C. §1144(a) conflicts with the Fourth Circuit's interpretation in Phoenix Mutual, the

Sixth Circuit's decision in McMillan, and the Ninth Circuits prior decision in Fortis, as well as the approach in the district courts, and aggravates the existing split of authority over interpretation of this statutory provision; for which reasons, this petition for certiorari is submitted upon the premises of SC Rule 10.1(a) that the Ninth Circuit "has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter."

B - The Court of Appeals' decision erroneously contravenes Congressional intent and this Court's holding in DeBuono.

Under the controlling criteria of DeBuono, the Court of Appeals was instructed not to concern itself exclusively with the impact that state law may have upon the administration of an ERISA plan, but also "to look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," quoting from New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995). The Ninth Circuit failed to look in the direction of Congressional intent as mandated by DeBuono.

In its passage of the preemptive provisions of ERISA Section 504(a), 29 U.S.C. §1144(a), Congress was concerned that ERISA "reflect recognition of the administrative realities of employee benefit plans." Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 9, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). As observed in Moore v. Philip Morris Companies, Inc., 8 F.3d 335, 341 (6th Cir. Ky. 1993), "[b]ecause of the myriad tasks of a plan administrator, such as determining eligibility of claimants and making disbursements, Congress believed that '[t]he most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides

a set of standard procedures to guide the processing of claims and disbursements'," quoting from Fort Halifax at 9. Also: Alessi v. Raybestos-Manhattan, 451 U.S., 504, 523 (1981) (Sec. 1144(a) intended to "establish pension plan regulation as an exclusively federal concern").

In the present case, the Ninth Circuit's rejection of the federal common law of substantial compliance in favor of state law altered the selection of the ultimate beneficiary and the allocation of the plan's assets, a not insubstantial or "too tenuous" connection with the ERISA plan. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Indeed, as observed by this Court in De Buono and in Alessi, where the state law has the effect of recalculating and reallocating "pension benefits that federal law permits," this is the "type of state law that Congress intended ERISA to supersede." DeBuono v. NYSA-ILA Medical and Clinical Services Fund, supra. at 813-184; Alessi v. Raybestos-Manhattan, Inc., supra. at 524-525.

Similarly, as also noted, Congress was concerned with the maintenance of a "uniform administrative scheme" which would not be subject to the diversity of state standards, a diversity that the Ninth Circuit's decision plainly invites when it observed that "the state law doctrine of substantial compliance would not affect the administration of the plan ... [r]ather, it would aid in determining the identity of the proper recipient of the proceeds." McMath at 17a.[3] But, what state

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[3] It should be noted that the Ninth Circuit's approval of Nevada's substantial compliance doctrine resulted in acceptance of the unsigned beneficiary designation in Fortis [Fortis at 992]; whereas the Ninth Circuit's application of California's law of substantial compliance resulted in the rejection of the unsigned beneficiary designation in McMath. McMath at 19a-22a. Such results plainly indicate that the adoption of state standards would be

law? The law of the participant's domicile? The law of the plan's administrative headquarters? The law of the state of employment? This is the very interfering vice that Congress hoped to preempt with Section 1144(a).[4]

And, what of the participant's wishes that Congress has claimed to preserve? The execution of a beneficiary designation form generally represents the sole involvement of the participant in his plan; and, at the same time, the designation represents the most critical aspect of the plan's operation, namely, giving effect to the participant's choice of his beneficiary. With the adoption of a federal standard for review of beneficiary designations, we bring and assure the uniformity that Congress intended and expected, while at the same time "eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." Pilot Life at 46, quoting Sen. Williams, 120 Cong. Rec. 29933 (1974). We also serve "the expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop." Pilot Life at 56.

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the bane of ERISA uniformity under 29 U.S.C. §1144(a).

[4] In this respect, note should be taken of the recently enacted Electronic Signature in Global and National Commerce Act, P.L. No. 106-229 (6/30/00), whereunder Congress recognizes the legal efficacy of electronic records and signatures in lieu of written contracts, agreements or records signed or affirmed by a signature, "in the context of writing and signing requirements imposed by law" [Sec. 101(d)], specifically preempting any "state statute, regulation, or other rule of law" which "is otherwise inconsistent with the provisions of this title" [Sec. 102(c)]. It would arguably now appear that Congress has adopted a federal law which invalidates any state substantial compliance rule that would limit an "electronic" designation.

Lastly, some recognition should be given to the provisions of 29 U.S.C. §1104(a)(1)(D) of ERISA which require that a plan administrator discharge his duties "in accordance with the documents and instruments governing the plan," which federally mandated duty should require him to look to federal standards in the interpretation of such "documents and instruments," rather than state standards. McMillan v. Parrot, supra, at 311.

C - The issue of ERISA preemption of state substantial compliance laws is an important question of federal law which has not been, but should be, settled by this Court.

As above demonstrated, the issue of preemption of state substantial compliance laws is an important question of federal law in light of the "uniformity" sought by Congress which is threatened by the following "administrative realities":

(1) The Ninth Circuit's decision effectively rewrites the plan to withdraw the discretion to interpret the plan's requirements as vested in the plan's Administrative Committee by the language of the plan, thereby inviting wasteful litigation.

(2) The Ninth Circuit's decision effectively rewrites the plan to invalidate the plan's administrative appellate procedures respecting the designation of beneficiaries, thereby inviting wasteful litigation.

(3) The Ninth Circuit's decision, in the context of a multi-state plan such as the BankAmerica 401(k) plan herein, frustrates the goal of uniformity by subjecting the plan's administration to the dictates of multiple and varied state laws

of substantial compliance respecting beneficiary designations.

(4) The Ninth Circuit's decision frustrates the development of a federal common law of rights and obligations under ERISA-regulated plans by adopting California's law of substantial compliance.

(5) The Ninth Circuit's decision to allow beneficiary designations to turn on the Administrative Committee's interpretation and selection of the appropriate state law encourages wasteful litigation and the unnecessary waste of the participants' plan assets.

(6) The Ninth Circuit's decision frustrates and ignores the participant's beneficiary designation, with its attendant hard results for the beneficiaries involved, "in favor of a formalistic, overly technical adherence, to the change of beneficiary provisions in a given policy." Pilot Life, supra. at 513.

(7) The Ninth Circuit's decision, by withdrawing the administrative discretion vested in the plan's Administrative Committee to interpret compliance with its provisions, exposes the plan to liability under ERISA for the plan's failure to give notice to its participant (Montgomery) that he had failed to strictly comply with the requirements of the plan and state law for a fully executed beneficiary designation form. See: Krohn v. Jurtone Memorial Hospital, 173 F.3d 542, 547-552 (6th Cir. Mich. 1999) (ERISA duty to notify participants re efficacy of forms - ERISA "duty to inform if silence is harmful").

These are the considerations that give importance to this issue of substantial compliance under ERISA. The issue has not been previously addressed by this Court; and, its

increasing frequency in the lower and appellate federal courts cries out for resolution.

CONCLUSION

For the foregoing reasons, therefore, this petition for writ of certiorari should be granted.

Dated: August 11, 2000

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 13, 2000]

No. 98-16543

BANKAMERICA PENSION PLAN, an employee benefit plan; BANKAMERICA 401(K) INVESTMENT PLAN, an employee benefit plan,
Plaintiffs,
v.

ALEXANDER S. MCMATH, an individual,
Defendant-Appellee,
v.

ALVA M. MONTGOMERY, an individual; PATSY PATTERSON, an individual; and THE ESTATE OF CLARENCE C. MONTGOMERY,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

OPINION

Before: Joseph T. Sneed, Harry Pregerson, and William A. Fletcher, Circuit Judges.

SNEED, Circuit Judge:

This case arises from an interpleader action brought by the BankAmerica 401(k) Plan ("401(k) Plan") and the BankAmerica Pension Plan ("Pension Plan," collectively, the "Plans") to resolve the proper beneficiaries of the benefits under the Plans. Defendants in the interpleader action, Alva M. Montgomery and Patsy Patterson (collectively, "Appellants"), appeal the summary judgment of the United States District Court for the Northern District of California, in favor of the co-defendant Alexander S. McMath ("Mr. McMath"). Appellants argue that summary judgment was improper against them because there were genuine issues of material fact and because the district court applied the incorrect law. We agree that the district court did err in that it should have applied California law rather than federal common law. Under California law, Mr. Montgomery did not substantially comply with the 401(k) Plan's beneficiary designation requirements. We therefore reverse the decision of the district court.

I.

BACKGROUND

Clarence C. Montgomery ("Mr. Montgomery") worked at Bank of America from approximately 1990 until his death in November 1996. This present dispute is over the

proceeds to the 401(k) Plan that Mr. Montgomery accumulated while working for Bank of America.[1] In 1990, Mr. Montgomery submitted a beneficiary designation form for the 401(k) Plan designating three primary beneficiaries: Alva Montgomery (his mother), Clarence H. Montgomery (his father), and Patsy Patterson (his sister). In March 1996, an *unsigned* beneficiary form was submitted for the 401(k) Plan, naming Mr. McMath as the primary beneficiary and Alva Montgomery as the contingent beneficiary. The 401(k) Plan accepted the form but failed to notice that it had not been signed.

After Mr. Montgomery's death in 1996, the 401(k) Plan realized the omission and informed both Mr. McMath and Appellants. Mr. McMath and Appellants subsequently attempted but were unable to reach an agreement on a division of the proceeds of the 401(k) Plan. In March 1997, both asserted claims to the 401(k) Plan. In April 1997, the 401(k) Plan claims administrator determined that the *unsigned* beneficiary form was valid, and that Mr. McMath was entitled to the 401(k) Plan benefit. Appellants appealed pursuant to the 401(k) Plan appeal procedures and in August 1997, the 401(k) Plan's Administrative Committee upheld the decision of the claim's administrator and denied the appeal.

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[1] We note that the Pension Plan is also a named party to the suit. In as much as the beneficiary designation form for the Pension Plan was also unsigned it is similar to the 401(k) Plan. However, neither party raised the issue of the validity of the beneficiary designation form for the Pension Plan in this appeal. We therefore leave the disposition of this matter to the discretion of the district court on remand.

The Plans filed an interpleader action under the Employee Retirement Income Security Act of 1974 (ERISA) and Federal Rule of Civil Procedure 22 to resolve the parties's respective positions in the dispute. In February 1998, the district court discharged the Plans from the action and released them from all liability to the claimants. Thereafter, Mr. McMath and Appellants filed cross motions for summary judgment and on July 22, 1998, the district court found that there were no genuine issues of material fact and ruled in favor of Mr. McMath.

The district court's ruling was based on the following findings: (1) Mr. Montgomery contacted the plan and requested the change of beneficiary form; (2) Mr. Montgomery then filled out the form and returned it, neglecting only to sign it; (3) Mr. Montgomery was deprived of the opportunity to sign the form because the plan's Service Center failed to return it to him for completion, in contravention of its standard policy to do so upon the receipt of unsigned forms; instead, (4) the Service Center filed the unsigned form as an effective change of beneficiary; and (5) the 401(k) Plan's fiduciary had discretion to determine eligibility for benefits and it exercised its discretion reasonably. In determining that the fiduciary had not abused its discretion, the district court found that: (1) ERISA preempted the state doctrine of substantial compliance; (2) a federal common law doctrine of substantial compliance applied; and (3) under the federal common law doctrine of substantial compliance Mr. Montgomery effectively designated Mr. McMath as his beneficiary.

We reverse and remand for further proceedings in accordance with this opinion.

II.

JURISDICTION

The district court had jurisdiction of this interpleader complaint under section 502 of the ERISA. *See* 29 U.S.C. § 1132. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III.

DISCUSSION

A. STANDARD OF REVIEW

We review a grant of summary judgment de novo. *See Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). In doing so, we "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

B. GENUINE ISSUES OF MATERIAL FACT

Viewing the evidence in the light most favorable to the nonmoving party, we must determine, first, whether there are any genuine issues of material fact. Appellants have raised three factual issues at various times during these proceedings: they contend (1) that Mr. Montgomery did not complete the form (i.e., the portion of the form that was filled out was not in Mr. Montgomery's handwriting); (2) that Mr. Montgomery did not submit the form (i.e., even if he did fill out the form it was not he who mailed it to the Bank of America); and,

alternatively, (3) that Mr. Montgomery completed and submitted the form to appease Mr. McMath but *intentionally* omitted his signature from the form because he did not intend to accomplish the change in beneficiary. We address each contention in turn.

1. *Did Mr. Montgomery Complete the Form?*

Appellants dispute the identity of the person who completed the unsigned beneficiary form. They argue that the handwriting is not Mr. Montgomery's and suggest that it is instead Mr. McMath's.[2] However, Appellants never raised this issue at the district court level. Further, the parties agreed in the Joint Case Management Statement that:

> Most facts are not in dispute. Defendants Alva Montgomery and Patsy Patterson dispute whether the deceased *submitted* the unsigned beneficiary forms. Defendants Alva Montgomery and Patsy Patterson also dispute whether the deceased had the capacity or intent to make beneficiary designation changes.

(emphasis added). Moreover, Appellants asserted in their Opening Brief that the *only* factual issue in dispute was who *submitted* the form. Only in their reply brief do they attempt to introduce doubt as to who *completed* the form. Finally, the

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[2] "Without further exemplars of Mr. Montgomery's handwriting, as well as Mr. McMath's handwriting, no definitive conclusions can be drawn about who completed the undated and unsigned form."

district court specifically asked counsel during the summary judgment hearing if there was a genuine issue as to who completed the form and counsel said there was not:

Judge: So I'm looking upon that and I'm accepting the fact that that is actually in Mr. Montgomery's handwriting. I think now is the time to come in with some evidence to the contrary, and I don't see any evidence to the contrary.

So, you're not suggesting, are you, that the genuine issue of material fact is whether or not [the form] is in Mr. Montgomery's handwriting?

Counsel: That would be correct . . . .

* * * *

Counsel: We have a form that was preprinted. *We have a form that he filled out.* We have a form that requires that he sign and date the form. But it was not signed or dated.

(Transcript of Summary Judgment Hearing at 12, 21, Clerks Record Folder 2) (emphasis added).

The parties cannot raise new issues on appeal to secure a reversal of the lower court's summary judgment determination. *See USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) (citations omitted). We therefore find that Appellants have waived the issue of whether or not Mr. Montgomery completed the form.

2. *Did Mr. Montgomery Return the Form to Bank of America?*

Appellants argue that there is a factual dispute about who submitted the unsigned, undated beneficiary designation form to Bank of America listing Mr. McMath as Mr. Montgomery's primary beneficiary. Appellants argue that the absence of any evidence on this issue indicates that it was *not* Mr. Montgomery who returned the unsigned and undated form.

However, "it is a general rule that a party cannot revisit theories that it raises but abandons at summary judgment." *USA Petroleum,* 13 F.3d at 1284. While it is true that Appellants initially raised the issue of who submitted the form in the district court, they effectively abandoned it at summary judgment. The district court judge asked at least five times during the summary judgment hearing what the genuine issues of material fact were. Appellants failed to raise the issue when given the opportunity and in fact conceded it. Appellants instead pursued the theory that Mr. Montgomery submitted the form but intentionally did not sign the form:

Counsel: I think the fact that Mr. Alexander (sic) read the form

and prepared some of it but didn't sign it is -- it's pretty significant, I think, to show that maybe his intent wasn't to make an actual change. Maybe there was some sort of discussion with Mr. McMath that he wanted to do the change. Maybe he didn't want to. Maybe this was a way that he would placate Mr. McMath's feelings.

Judge: But he sent it back. Couldn't I infer that he sent it back?

I mean, let's say he simply wanted to placate. And I don't want to get into the realm of speculation, but we don't have to speculate the fact that it was received by the Bank of America.

Counsel: But if he knew that he had to properly authorize the change of beneficiary, which is what the form instructs him to do, he knows that by sending it in, it doesn't matter. It's not a valid form in which he has designated his family, and by

> doing it this way, you know, he appeases.

(Transcript of Summary Judgment Hearing at 14, Clerk's Record Folder 2).

A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case. *See USA Petroleum,* 13 F.3d at 1282. It is immaterial whether the issue was not addressed in the district court because it was not raised, or because it was raised but conceded by the party seeking to revive it on appeal. *See id.* at 1284. We therefore find that Appellants abandoned the argument that someone other than Mr. Montgomery submitted the form and will not reach it on appeal.

3. *Did Mr. Montgomery Intentionally Omit His Signature From the Form?*

In the district court, Appellants argued that Mr. Montgomery completed and submitted the form to appease Mr. McMath but *intentionally* omitted his signature from the form because he did not intend to accomplish the change in beneficiary. However, Appellants did not raise this issue on appeal and we therefore do not consider it.

4. *Was There Adequate Opportunity for Discovery?*

Finally, Appellants assert that they could not argue or present any evidence to show that it was not Mr. Montgomery who completed or submitted the unsigned and undated form

because they did not have an opportunity for discovery. This contention is wholly without merit. The parties agreed to a discovery schedule in December 1997 that allowed for discovery through written requests for documents and discovery subpoenas. The summary judgment hearing was six months later, in June 1998. At that hearing, the district court judge flatly rejected Appellants's contention and noted: "If you felt that some discovery was necessary for you to respond to their motion for summary judgment you could have asked for it. You didn't make any such request." We agree with the district court that the Appellant had an opportunity for discovery.

5. *Conclusion*

Because Appellants either abandoned or failed to dispute the possible factual issues we find that the district court did not err in holding that there was no genuine issue of material fact that would require a trial. Accordingly, we accept as true that Mr. Montgomery completed and submitted the beneficiary designation form.

C. APPLICATION OF THE RELEVANT SUBSTANTIVE LAW

1. *Overview*

We now review the Administrative Committee's decision to award benefits to one claimant and deny benefits to the competing claimants. Initially we must determine what discretion, if any, should be accorded the decision of the Administrative Committee. We will review its decision for an abuse of discretion if the 401(k) Plan gives the Administrative

Committee "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Nelson v. EG&G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1388 (9th Cir. 1994). However, should we determine that the Administrative Committee did not have such discretion under 401(k) Plan then we will determine, de novo, the proper beneficiary. *See Firestone*, 489 U.S. at 115.

In making a de novo determination, we apply the equitable doctrine of substantial compliance to determine whether Mr. Montgomery's attempt to change the beneficiary, although less than what the 401(k) Plan strictly required, was sufficient to effect the change.

2. *Scope of Administrative Committee's Discretion*

The 401(k) Plan states that the "Administrative Committee shall have discretionary authority to determine eligibility for benefits and to construe the terms of the Plan." Article 10.3(a) of the 401(k) Plan. The district court found that the 401(k) Plan directly granted the Administrative Committee discretion in determining the eligibility of beneficiaries. In fact, however, the Administrative Committee was not given the discretion to waive the signature requirement.

The 401(k) Plan clearly provides that a beneficiary designation "*shall* be made by submitting a Beneficiary designation to the Service Center" and "the Participant *shall* take such action by completing *and signing* the form prescribed by the Administrative Committee for that purpose

and filing such form with the Service Center." Article 7.2(b) of the 401(k) Plan (emphasis added). The 401(k) Plan further provides that "[n]either the Committees nor any of their members shall have the power to add to, *subtract from or modify* any of the terms of the Plan or Trust Agreement, to change any benefits otherwise than as provided by the Plan, or to waive or fail to apply any eligibility requirements for benefits under this Plan." Article 10.7 of the 401(k) Plan (emphasis added). The Administrative Committee thus did not have the discretion to "subtract from or modify" the terms of the 401(k) Plan. More specifically, it did not have the discretion to "subtract from or modify" the requirement that a Beneficiary Designation Form be signed.

This conclusion does not render the grant of discretionary authority meaningless. For example, the Administrative Committee had the discretion to determine eligibility for benefits under Article II of the 401(k) Plan (Eligibility to Participate). The Administrative Committee had other discretionary authority as well, including, *inter alia,* discretion to adopt rules as it deems appropriate (provided they are systematically followed and consistently applied). Article 10.3(a)(3), 10.5 of the 401(k) Plan.

The conclusion that the Administrative Committee was not given discretion to determine whether the beneficiary designation requirements were met does not end our inquiry. Courts have discretion to employ the equitable doctrine of substantial compliance, which is intended to circumvent harsh results "engendered by a formalistic, overly technical adherence to the exact words of the change of beneficiary provision in a given policy." *Phoenix Mutual Life Insurance Co. v. Adams,* 30 F.3d 554, 563 (4th Cir. 1994). This

doctrine necessarily allows less than strict compliance with the terms of the plan. Nonetheless, the compliance must be substantial. Accordingly, we must determine whether Mr. Montgomery's compliance was substantial enough to save his defective beneficiary designation.

3. *Substantial Compliance Doctrine*

The first step in this inquiry is to determine whether federal or state law applies. The Plans are ERISA plans and are governed by ERISA. However, no ERISA provision expressly governs disputes between claimants to plan proceeds. *See Emard v. Hughes Aircraft Co.,* 153 F.3d 949, 957 (9th Cir. 1998).

In the absence of federal law we are ordinarily required to apply the law of the forum state. *See Erie Railroad v. Tompkins,* 304 U.S. 64 (1938). However, ERISA preempts "any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. §1144(a). Therefore, we must determine whether ERISA preempts California's doctrine of substantial compliance.

a. Preemption

The district court held that ERISA preempted any state law doctrine of substantial compliance. We "review de novo the district court's interpretation and application of ERISA provisions and its determination that ERISA preempts state law." *Hughes Aircraft,* 153 F.3d at 952.

ERISA is a comprehensive statutory scheme designed to govern employee benefit plans, which provides that it

"shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). Whether ERISA preempts a state substantial compliance doctrine is a question of first impression in this circuit; however, the Fourth and Tenth Circuits have addressed the issue.

The Tenth Circuit found that:

> ERISA is concerned with state law doctrines that serve to modify a plan because such doctrines could destabilize the plan as well as subject it to conflicting state regulation. However, these concerns apply only where the potential modification is material. By definition, the doctrine of substantial compliance does not materially modify a plan, but rather is simply a doctrine to assist the court in determining whether conduct should, in reality, be considered the equivalent of compliance under the contract.

Peckham v. Gem State Mutual of Utah, 964 F.2d 1043, 1051 (10th Cir. 1992).

The Fourth Circuit, while agreeing that the doctrine of substantial compliance does not materially modify a plan, rejected the Tenth Circuit's preemption analysis and found instead that "the test of ERISA preemption 'is not whether a state law modifies a plan, but whether a state law 'relates to' a plan.'" *Phoenix Mutual,* 30 F.3d 554, 559 (4th Cir. 1994). The Fourth Circuit also criticized the Tenth Circuit's holding

in *Peckham* as "unduly restrictive in light of the Supreme Court's language in *Pilot Life.*" *Phoenix Mutual* at 560.

The Supreme Court in *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 44-45 (1987), interpreted ERISA's preemption statute as creating a deliberately expansive preemption of state law. *See Hughes Aircraft,* 153 F.3d at 953. However, the Supreme Court has retreated from the "deliberately expansive" preemption language of *Pilot Life.* It recognizes that the ERISA preemption must have limits when it enters areas traditionally left to state regulation. Thus, the current ERISA preemption analysis provides that a law 'relates to' an employee benefit plan if it has (1) a "reference to" or (2) a "connection with" an ERISA plan. *See California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324 (1997); *Hughes Aircraft,* 153 F.3d at 954.

b. Application of Dillingham Constr. N.A., Inc.

Under *Dillingham,* a state law has "reference to" ERISA plans where it "acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA plans is essential to the law's operation." 519 U.S. at 325. California's doctrine of substantial compliance plainly does not act immediately and exclusively upon ERISA plans, nor is the existence of ERISA plans essential to the doctrine's operation. The issue is whether the doctrine has a "connection with" ERISA benefit plans.

To determine the existence of a forbidden connection, we "must go beyond the unhelpful text and the frustrating

difficulty of defining its key term ['relate to'], and look instead to both the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," and "the nature of the effect of the state law on ERISA plans." *Id.* (citation omitted). This approach closely resembles the approach taken in *Peckham,* 964 F.2d at 1052, where the court looked to the ERISA statute and found that the doctrine of substantial compliance did not frustrate any of its objectives. Therefore, we find this approach persuasive.

Our decision in *Hughes Aircraft,* 153 F.3d at 959, held that state community property law was not preempted even though it would require the distribution of ERISA proceeds to a person other than the designated beneficiary. *See id.* We drew a distinction between laws that affected the administration of the plans and those that merely affected the ultimate ownership of the distributed benefits. *See id.* The court noted that "[i]f a contending claim [for the benefits] is made before disbursement, the administrator can leave the determination of the proper recipient of the proceeds to the parties through the application of state property law." *Id.* The court looked to the effect of the state law on the administration of the plan and found that the burdens on the administrator were too slight to overcome the presumption against preemption. *See Hughes Aircraft,* 153 F.3d at 959.

The present case is similar. We hold that in this case the state law doctrine of substantial compliance would not affect the administration of the plan. Rather, it would aid in determining the identity of the proper recipient of the proceeds. As with the application of state community property law in *Hughes Aircraft,* the burden on the administrator resulting from applying state substantial

compliance law would be slight and is not enough to overcome the presumption against preemption.

This court has reviewed the relationship between an ERISA benefit plan and state law in several contexts. These include: "(1) whether the state law regulates the types of benefits of ERISA employee welfare benefit plans; (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law; (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee." *Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co.,* 135 F.3d 671, 678 (9th Cir. 1998) (citing *Aloha Airlines v. Ahue,* 12 F.3d 1498, 1504 (9th Cir. 1993)).

The first three *Aloha* factors are not at issue. The doctrine of substantial compliance does not regulate the *types of benefits* of ERISA plans; does not require *the establishment of a separate employee benefit plan;* and does not *impose reporting, disclosure, funding or vesting requirements.* However, as previously discussed, the doctrine of substantial compliance on the facts of this case affects only the ultimate ownership of the benefits. This connection with ERISA is too "tenuous, remote, or peripheral" to trigger preemption. *See Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983).

For the foregoing reasons, we hold that ERISA does not preempt the application of California's doctrine of substantial compliance. Accordingly, there is no need for a

federal common law substantial compliance doctrine that would fill the vacuum. We turn now to the application of California's doctrine of substantial compliance to the facts of this case.

c. Substantial Compliance under California Law

The Supreme Court of California has articulated the state's substantial compliance doctrine in insurance contracts:

> Where the insured makes every reasonable effort under the circumstances, complying as far as he is able with the rules, and there is a clear manifestation of intent to make the change, which the insured has put into execution as best he can, equity should regard the change as effected.

Pimentel v. Conselho Supremo de Uniao Portugueza do Estada da California, 57 P.2d 131, 134 (Cal. 1936). The Supreme Court of California has relaxed the rule when interpreting provisions for death benefits under a mandatory teacher retirement system, requiring only an establishment of an intention to change beneficiaries and some affirmative action evidencing the exercise of the right to change.[3] *See*

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[3] This relaxed substantial compliance doctrine is virtually identical to the one that the district court applied in this case. We need not reach whether the district court correctly applied this relaxed doctrine because we ultimately must apply the stricter doctrine.

Watenpaugh v. State Teacher's Retirement System, 336 P.2d 165, 169 (Cal. 1959) (In Bank).

However, *Watenpaugh* dealt with a mandatory teacher retirement system. The lesser standard was justified because the retirement benefits at issue "were completely statutory in origin, membership in the retirement system [was] compulsory, and the requirements for change of beneficiary [were] not subject to negotiation." *Id.* The California Supreme Court very likely would apply the stricter standard under the facts of this case. The 401(k) Plan beneficiary designation provisions are not statutory and membership in the 401(k) Plan is not compulsory. Although the requirements for change of beneficiary were not negotiable, neither are they in insurance contracts. We therefore apply the California doctrine of substantial compliance as set forth in *Pimentel.*

In *Pimentel,* the insured signed a change of beneficiary form while ill in the hospital. 57 P.2d at 133. He acknowledged his signature before a notary public and made statements to those around him that he was changing his beneficiary. *Id.* He then entrusted the form to his attorney "to take all necessary steps to complete the change." *Id.* at 132. The form was never forwarded to the insurer, a fifty cent fee was not paid, and various ministerial actions required to be taken by the officers of the insurer were never accomplished. *Id.* The California Supreme Court properly concluded that the insured had done all that he could do to change the beneficiary and that the reason for its failure was beyond his control. *Id.* at 134.

This case presents a different set of facts. At best, Mr. Montgomery was careless when he failed to sign the beneficiary designation form. He did not do all that he could have done. Mr. McMath argues that Mr. Montgomery did not sign the form because the 401(k) Plan failed to return the unsigned form to him, in contravention of their standard policy. However, the focus of the California cases is failures of the insurer that prevent a beneficiary change, rather than the insured's failures. *See Pimentel,* 57 P.2d at 131; *Saunders v. Stevers,* 34 Cal. Rptr. 579 (Cal. Dist. Ct. App. 1963); *Prudential Insurance Co. v. Withers,* 127 F.3d 1106 (9th Cir. 1997) (unpublished disposition). In this case Mr. Montgomery was more at fault than was the Service Center.[4]

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[4] *Cf Saunders v. Stevers,* 34 Cal. Rptr. 579 (Cal Dist. Ct. App. 1963). The beneficiary designation requirements in *Saunders,* while ambiguous, appeared to require only written notice to effect a change. *See id.* at 581. The insured fulfilled this requirement by a letter written to the insurance company:

> I have remarried and wish to have my policies mailed to the above address. Also I wish to have both my policies to read Becky Jane Stevers as beneficiary -- Sincerely Nancy J. Bardosy. P.S. - I am removing my son Barney Robert Pearson Saunders he having been well provided for by his father.

See id. The insurance company subsequently sent the insured beneficiary change forms but she died before returning the forms. *See id.* The court's ruling appears to be based on the fact that the insured's first letter to the insurance company fulfilled the requirement that she give written notice to the insurer. *See id.* Her

Therefore, we hold that Mr. Montgomery did not substantially comply with the beneficiary designation requirements of the 401(k) Plan under California's doctrine of substantial compliance.

IV.

CONCLUSION

For the foregoing reasons, we reverse the decision of the District Court and remand for further proceedings in accordance with this decision.

REVERSED AND REMANDED.

SNEED, Circuit Judge, specially concurring:

We made no presumption in the opinion that Mr. Montgomery intended to designate Mr. McMath as his beneficiary. I concur to emphasize that his designation would fail under California law even if extrinsic evidence could prove that he possessed such intent because California law requires a clear manifestation of intent *and* "every reasonable effort under the circumstances, complying as far as he is able with the rules." *See Pimentel v. Conselho Supremo de Uniao*

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failure to complete the beneficiary designation forms was not fatal. *See id.* In contrast, the 401(k) Plan provides that the Beneficiary designation "*shall* only be made by submitting the form designated for that purpose. . . to the Service Center."

Portugueza do Estada da California, 57 P.2d 131, 134 (Cal. 1936). Mr. Montgomery did not comply as far as he was able with the beneficiary designation requirements.

California law properly recognizes that transfers of wealth at death should be done with a significant degree of formality and should not be left to the vagaries of the testimony of the indicated beneficiary and other claimants arising out of kinship or the murkiness of certain testimonial provisions. Thus, California law properly requires more than a clear manifestation of the intent of the decedent. It requires, to repeat, that the decedent make every reasonable effort under the circumstances to effect that change. This is a heavy burden to meet and, in most instances, will not be met short of the decedent actually having signed the beneficiary designation form if such signature is required to effect the change.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed August 6, 1998]

No. C 97-3242 CRB

BANKAMERICA PENSION PLAN, et al.,
Plaintiffs,

v.

ALEXANDER S. MCMATH, et al.,
Defendants.

AMENDED ORDER GRANTING ALEXANDER MCMATH'S MOTION FOR SUMMARY JUDGMENT AND DENYING CROSS-MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment in this dispute over the distribution of money from a Bank of America Employee Benefit Plan. Having carefully read and considered the papers submitted by the parties, and having had the benefit of oral argument on Friday, June 19, 1998 the Court GRANTS Alexander McMath's motion for summary judgment and DENIES the motion made by Alva

Montgomery, Patsy Patterson, and the estate of Clarence C. Montgomery.

I. FACTS

A. Explanation of the Parties' Dispute

These cross-summary judgment motions involve competing claimants to the benefits from a Bank of America 401(k) Investment Plan; decedent also possessed a Bank of America Pension Plan, which is not at issue here. The material facts in this case are undisputed. The deceased, Clarence C. Montgomery, possessed a Bank of America 401(k) Investment Plan. In 1990, he submitted a beneficiary designation form for the 401(k) Plan designating three primary beneficiaries: Alva Montgomery, Clarence H. Montgomery (the decedent's father), and Patsy Patterson. On March 12, 1996, an unsigned beneficiary form was submitted for the 401(k) Plan, naming defendant Alexander McMath as the primary beneficiary and defendant Alva Montgomery as the contingent beneficiary.

After Clarence Montgomery died in November 1996, the defendants failed to reach agreement on a division of the proceeds of the Plans. In March 1997, defendants McMath, Patterson, and Alva Montgomery asserted claims to the 401(k) Plan. On April 1, the Plan claims administrator determined that the unsigned beneficiary form was valid, that McMath was entitled to the 401(k) Plan benefit, and that Alva Montgomery was entitled to the Pension Plan benefit. Defendants appealed pursuant to the Plan appeal procedures and in August 1997 the Plan's Administrative Committee

upheld the decision of the claims administrator and denied the appeal.

The Plans filed an interpleader action under Federal Rule of Civil Procedure 22 to resolve the parties' respective positions in the dispute. On February 13, 1998, this Court discharged the Plans from this action and released them from all liability to defendants. The parties have now filed cross-motions for summary judgment on the issue of the award of the benefits of the 401(k) Plan.

B. Determinations Made by the Plan

In an April 1, 1997 letter, the Bank of America Plan Service Center found that:

> Mr. Montgomery designated a "Beneficiary" under section 7.2 of the Plan, that [he] designated Alexander McMath as his sole primary Beneficiary under the Plan, that such designation revoked and superseded [his] prior Plan Beneficiary designation dated August 3, 1990 which named Alva M. Montgomery, Clarence H. Montgomery . . . and Patsy M. Patterson, and therefore, Mr. McMath, as Mr. Montgomery's sole primary Beneficiary under the Plan, is entitled to receive Mr. Montgomery's entire interest under the Plan.

(Emphasis added.)

The Service Center articulated its factual findings in that document. The letter noted that the "standard procedure at

the Service Center is to reject unsigned beneficiary designation forms and allow the participant an opportunity to submit a signed form" but that in this case Mr. Montgomery was "not notified" of his failure to sign the form. Still, the Service Center found that the unsigned form was effective to change Mr. Montgomery's designation of his intended beneficiary.

Alva Montgomery and Patsy Patterson appealed to the Plan's Administrative Committee. The Committee, after reciting various provisions of the agreement, made the following factual findings in an August 29, 1997 letter:

> On February 27, 1996, Clarence Montgomery used his personal access code to contact a customer service representative at the BankAmerica Retirement Plans Service Center. [He] requested beneficiary designation forms for both the 401(k) Investment Plan and the BankAmerica Pension Plan. (The Committee reviewed the transcript of this conversation between Mr. Montgomery and the customer service representative.) Beneficiary designation forms pre-printed with Mr. Montgomery's name and Social Security number were sent to Mr. Montgomery at his work location. Two weeks later, on March 12, 1996, those forms were returned to the Service Center, naming one primary beneficiary (Alexander McMath) under the 401(k) Investment Plan and a different beneficiary (Alva Montgomery) under the Pension Plan. The beneficiary designation

> forms were completed in handwriting, but lacked a date and signature.

Accordingly, the Committee affirmed the Service Center's findings and "determined that Mr. Montgomery did designate a beneficiary by submitting this beneficiary designation to the Service Center for purposes of Section 7.2(b) of the 401(k) Investment Plan." It concluded that "[i]n giving effect to Mr. Montgomery's unsigned beneficiary designation form, despite Section 10.10(a)(1) of the 401(k) Investment Plan, the Committee believes it is discharging its duty solely in the interests of Mr. Montgomery, a deceased Plan participant, and his designated beneficiaries."

C. Relevant Plan Provisions

The procedural sections of the plan are straightforward. Section 7.2(b) of the Plan, entitled Beneficiary Designation, provides that "[s]uch designation shall be made by submitting a Beneficiary designation to the Service Center. The Participant may change or cancel his or her Beneficiary designation at any time." Section 10.10(a)(1) provides that "[w]henever the Plan requires or permits the Participant to file a Plan form, the Participant shall take such action by completing and signing the form prescribed by the Administrative Committee for that purpose and filing such form with the Service Center. The form is considered submitted and deemed filed upon receipt by the Service Center."

II. LEGAL ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, (1986). A principal purpose of the summary judgment procedure is to identify and to dispose of factually unsupported claims. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). When "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there was no genuine issue for trial." A party is entitled to summary judgment where there are no genuine issues of material fact that would require a trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). No genuine issue of material fact exists if the evidence "is of insufficient caliber or quantity to allow a rational finder of fact" to find for the nonmoving party. Anderson, 477 U.S. at 245.

B. Standard for Court's Review of the Plan's Determination

"District Courts must review the acts of ERISA plan administrators de novo, 'unless the benefit plan gives the administrator or fiduciary discretionary authority to determine

eligibility for benefits or to construe the terms of the plan,' in which case the courts will not disturb the administrator's decisions unless it is arbitrary and capricious." O'Shea v. First Manhattan Co. Thrift Plan & Trust, 55 F.3d 109, 111-112 (2d Cir. 1995) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1988)). McMath argues that the Court must confine itself to an abuse of discretion review of the Plan's decision. The Montgomery cross-motion contends that because ERISA § 404(a)(1)(D) dictates "that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . in accordance with the documents and instruments governing the plan," the Committee was not acting pursuant to a discretionary authority under the plan and the Court should conduct a de novo review.

Section 10.7 of the Plan states that "[n]either the Committees nor any of their members shall have the power to add to, subtract from or modify any of the terms of the Plan or Trust Agreement, to change any benefits otherwise than as provided by the Plan, or to waive or fail to apply any eligibility requirements for benefits under this Plan." Section 10.3(a)of the Plan, however, states that the "Administrative Committee shall have discretionary authority to determine eligibility for benefits and to construe the terms of the Plan and Trust." Thus, the Plan directly grants the Administrative Committee discretion in determining eligibility of beneficiaries. In a case involving similar language, the Ninth Circuit held that such language was sufficient to confer discretion on an administrator. See Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 814-15 (7th Cir. 1997) (applying arbitrary and capricious standard when plan's language provided that vice president is "responsible for

interpretations of this Plan."). Accordingly, the Court will defer to the Committee's decision in this action unless it determines that the decision was arbitrary and capricious.

B. Substantial Compliance

The parties dispute whether the doctrine of substantial compliance is applicable to federal law and specifically, to an ERISA preemption action. The issues presented by this dispute substantially mirror Phoenix Mutual Life Ins. Co. v. Adams, 30 F.3d 554 (4th Cir. 1998). In Phoenix, the Fourth Circuit held that ERISA preempted any state substantial compliance law and that federal common law applied to the determination of ERISA insurance benefits. Phoenix, 30 F.3d at 560-61. In reaching that conclusion, the court undertook a detailed analysis of such employee benefit plans in light of the broad scope of ERISA preemption. Id. at 560-62. This Court agrees with the holding that "the substantial compliance doctrine, as applied to a change of beneficiary provision of an ERISA plan life insurance policy, does 'relate to' the employee benefit plan at issue." Id. at 560. Accordingly, any state substantial compliance doctrine is preempted by ERISA.

Although the state substantial compliance doctrine may be preempted, the Court must also look to the doctrine of substantial compliance as applied under federal common law. See Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 (9th Cir. 1984) ("[t]he courts are directed to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA, referring to and guided by principles of state law

when appropriate, but governed by the federal policies at issue.").

Again, the Fourth Circuit's Phoenix case provides a cogent guide for the court. There, the court performed a detailed examination of the relationship between the federal common law doctrine of substantial compliance and ERISA. The court concluded that application of the substantial compliance doctrine does not conflict with the broad goals of ERISA. Id. at 563-64. Accordingly, it adopted the district court's definition of the federal common law doctrine of substantial compliance:

> [P]ursuant to federal common law, an insured substantially complies with the change of beneficiary provisions of an ERISA life insurance policy when the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.

Id. at 564 (citing Phoenix Mutual Life Ins. Co. v. Adams, 828 F. Supp. 379, 388 (D.S.C. 1993). As the court noted, "the point of the doctrine . . . is to give effect to an insured's intent to comply when that intent is evident . . . that intent furthers the purposes of ERISA without compromising the integrity of policies issued by plan sponsors." Id. at 565. This Court finds the Fourth Circuit's analysis to be persuasive on this issue as well.

BEST AVAILABLE COPY

In Phoenix, the court found that the insured had substantially complied with the plan's requirements. In that case, the decedent had signed the form necessary for the change, but had not filled out the "Change beneficiary to" line naming his new beneficiary. The insured had, however, informed a clerk of his intent to make the change of beneficiary to include his new wife, but the clerk had failed to do so before the insured's death. An examination of the totality of the evidence lead the court to conclude that the insured intended to make the change of beneficiary and that he had substantially complied with the procedures required to do so. Id. at 567-68. Accordingly, it awarded the benefits to the new beneficiary who had not been named on the change of beneficiary form. Id.

C. Sufficiency of the Evidence

In this case, an analysis of the facts leads the Court to conclude that Mr. Montgomery substantially complied with the requirements necessary to effectuate a change of beneficiary. Mr. Montgomery contacted the plan and requested the change of beneficiary form. He then returned the partially completed form, neglecting only to sign it. Mr. Montgomery was deprived of the opportunity to sign the form only because the plan's Service Center failed to return it to him for completion, in contravention of its standard policy to do so upon the receipt of unsigned forms. Instead, the Service Center filed the unsigned form as an effective change of beneficiary.[1]

---

[1] Mr. McMath also presents evidence that Mr. Montgomery may have participated in Bank of America s Benefits Line program which allows individual to make account changes,

The Court finds that Mr. Montgomery's submission of the unsigned form with Mr. McMath's name as the new beneficiary is highly indicative of Mr. Montgomery's intent. Furthermore, the parties opposing the change of beneficiary present no evidence that Mr. Montgomery did not intend to change his beneficiary or that he did not personally complete the change of beneficiary form. Thus, no reasonable finder of fact could hold other than that Mr. Montgomery both intended to effectuate a change of beneficiary and that he attempted to comply with all the requirements to do so. Under federal common law, these actions constitute substantial compliance.

In assessing the circumstances of this case, the Court cannot find that any issues of material fact exist which make this motion inappropriate for decision on summary judgment. There is no genuine dispute that Mr. Montgomery substantially complied with the procedures necessary to name Mr. McMath as his primary beneficiary. As Mr. Montgomery did so, there can be no contention that the Plan acted arbitrarily in awarding the benefits to Mr. McMath.

III. CONCLUSION

The Court finds that the Bank of America Administrative Committee was not arbitrary and capricious in

---

including beneficiary changes, over the phone. No party, however, has affirmatively demonstrated that Mr. Montgomery was enrolled in this service or used it to effectuate a change of beneficiary. Accordingly, it is not relevant to the Court's ultimate decision.

holding that Mr. Montgomery named Alexander McMath as his primary beneficiary for the 401(k) plan. Accordingly, the Court GRANTS Alexander McMath's motion for summary judgment and DENIES the summary judgment motion brought by Alva Montgomery, Patsy Patterson, and the estate of Clarence Montgomery.

IT IS SO ORDERED.

Dated: 8/6/98

/s/_____
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed July 20, 1998]

No. C 97-3242 CRB

BANKAMERICA PENSION PLAN, et al., *Plaintiffs,*	)
v.	)
ALEXANDER S. MCMATH, et al., *Defendants.*	)

ORDER GRANTING ALEXANDER MCMATH'S MOTION FOR SUMMARY JUDGMENT AND DENYING CROSS-MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment in this dispute over the distribution of money from a Bank of America Employee Benefit Plan. Having carefully read and considered file papers submitted by the parties, and having had the benefit of oral argument on Friday, June 19, 1998 the Court GRANTS Alexander McMath's motion for summary judgment and DENIES the motion made by Alva

Montgomery, Patsy Patterson, and the estate of Clarence C. Montgomery.

I. FACTS

A. Explanation of the Parties' Dispute

These cross-summary judgment motions involve competing claimants to the benefits from a Bank of America 401(k) Investment Plan; decedent also possessed a Bank of America Pension Plan, which is not at issue here. The material facts in this case are undisputed. The deceased, Clarence C. Montgomery, possessed a Bank of America 401(k) Investment Plan. In 1990, he submitted a beneficiary designation form for the 401(k) Plan designating three primary beneficiaries: Alva Montgomery, Clarence H. Montgomery (the decedent's father), and Patsy Patterson. On March 12, 1996, an unsigned beneficiary form was submitted for the 401(k) Plan, naming defendant Alexander McMath as the primary beneficiary and defendant Alva Montgomery as the contingent beneficiary.

After Clarence Montgomery died in November 1996, the defendants failed to reach agreement on a division of the proceeds of the Plans. In March 1997, defendants McMath, Patterson, and Alva Montgomery asserted claims to the 401(k) Plan. On April 1, the Plan claims administrator determined that the unsigned beneficiary form was valid, that McMath was entitled to the 401(k) Plan benefit, and that Alva Montgomery was entitled to the Pension Plan benefit. Defendants appealed pursuant to the Plan appeal procedures and in August 1997 the Plan's Administrative Committee

upheld the decision of the claims administrator and denied the appeal.

The Plans filed an interpleader action under Federal Rule of Civil Procedure 22 to resolve the parties' respective positions in the dispute. On February 13, 1998, this Court discharged the Plans from this action and released them from all liability to defendants. The parties have now filed cross-motions for summary judgment on the issue of the award of the benefits of the 401(k) Plan.

B. Determinations Made by the Plan

In an April 1, 1997 letter, the Bank of America Plan Service Center found that:

> Mr. Montgomery designated a "Beneficiary" under section 7.2 of the Plan, that [he] designated Alexander McMath as his sole primary Beneficiary under the Plan, that such designation revoked and superseded [his] prior Plan Beneficiary designation dated August 3, 1990 which named Alva M. Montgomery, Clarence H. Montgomery . . . and Patsy M. Patterson, and therefore, Mr. McMath, as Mr. Montgomery's sole primary Beneficiary under the Plan, is entitled to receive Mr. Montgomery's entire interest under the Plan.

(Emphasis added.)

The Service Center articulated its factual findings in that document. The letter noted that the "standard procedure at

the Service Center is to reject unsigned beneficiary designation forms and allow the participant an opportunity to submit a signed form" but that in this case Mr. Montgomery was "not notified" of his failure to sign the form. Still, the Service Center found that the unsigned form was effective to change Mr. Montgomery's designation of his intended beneficiary.

Alva Montgomery and Patsy Patterson appealed to the Plan's Administrative Committee. The Committee, after reciting various provisions of the agreement, made the following factual findings in an August 29, 1997 letter:

> On February 27, 1996, Clarence Montgomery used his personal access code to contact a customer service representative at the BankAmerica Retirement Plans Service Center. [He] requested beneficiary designation forms for both the 401(k) Investment Plan and the BankAmerica Pension Plan. (The Committee reviewed the transcript of this conversation between Mr. Montgomery and the customer service representative.) Beneficiary designation forms pre-printed with Mr. Montgomery's name and Social Security number were sent to Mr. Montgomery at his work location. Two weeks later, on March 12, 1996, those forms were returned to the Service Center, naming one primary beneficiary (Alexander McMath) under the 401(k) Investment Plan and a different beneficiary (Alva Montgomery) under the Pension Plan. The beneficiary designation

> forms were completed in handwriting, but lacked a date and signature.

Accordingly, the Committee affirmed the Service Center's findings and "determined that Mr. Montgomery did designate a beneficiary by submitting this beneficiary designation to the Service Center for purposes of Section 7.2(b) of the 401(k) Investment Plan." It concluded that "[i]n giving effect to Mr. Montgomery's unsigned beneficiary designation form, despite Section 10.10(a)(1) of the 401(k) Investment Plan, the Committee believes it is discharging its duty solely in the interests of Mr. Montgomery, a deceased Plan participant, and his designated beneficiaries."

C. Relevant Plan Provisions

The procedural sections of the plan are straightforward. Section 7.2(b) of the Plan, entitled Beneficiary Designation, provides that "[s]uch designation shall be made by submitting a Beneficiary designation to the Service Center. The Participant may change or cancel his or her Beneficiary designation at any time." Section 10.10(a)(1) provides that "[w]henever the Plan requires or permits the Participant to file a Plan form, the Participant shall take such action by completing and signing the form prescribed by the Administrative Committee for that purpose and filing such form with the Service Center. The form is considered submitted and deemed filed upon receipt by the Service Center."

II. LEGAL ANALYSIS

A. Summary Judgment Standard

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B. Standard for Court's Review of the Plan's Determination

"District Courts must review the acts of ERISA plan administrators de novo, 'unless the benefit plan gives the administrator or fiduciary discretionary authority to determine

eligibility for benefits or to construe the terms of the plan,' in which case the courts will not disturb the administrator's decisions unless it is arbitrary and capricious." O'Shea v. First Manhattan Co. Thrift Plan & Trust, 55 F.3d 109, 111-112 (2d Cir. 1995) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1988)). McMath, citing abrogated law, argues that the Court must confine itself to an abuse of discretion review of the Plan's decision. The Montgomery cross-motion contends that because ERISA § 404(a)(1)(D) dictates "that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . in accordance with the documents and instruments governing the plan," the Committee was not acting pursuant to a discretionary, authority under the plan and the Court should conduct a de novo review.

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Although the state substantial compliance doctrine may be preempted, the Court must also look to the doctrine of substantial compliance as applied under federal common law. See Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 (9th Cir. 1984) ("[t]he courts are directed to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA, referring to and guided by principles of state law

when appropriate, but governed by the federal policies at issue.").

Again, the Fourth Circuit's Phoenix case provides a cogent guide for the court. There, the court performed a detailed examination of the relationship between the federal common law doctrine of substantial compliance and ERISA. The court concluded that application of the substantial compliance doctrine does not conflict with the broad goals of ERISA. Id. at 563-64. Accordingly, it adopted the district court's definition of the federal common law doctrine of substantial compliance:

> [P]ursuant to federal common law, an insured substantially complies with the change of beneficiary provisions of an ERISA life insurance policy when the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.

Id. at 564 (citing Phoenix Mutual Life Ins. Co. v. Adams, 828 F. Supp. 379, 388 (D.S.C. 1993). As the court noted, "the point of the doctrine . . . is to give effect to an insured's intent to comply when that intent is evident . . . that intent furthers the purposes of ERISA without compromising the integrity of policies issued by plan sponsors." Id. at 565. This Court finds the Fourth Circuit's analysis to be persuasive on this issue as well.

In Phoenix, the court found that the insured had substantially complied with the plan's requirements. In that case, the decedent had signed the form necessary for the change, but had not filled out the "Change beneficiary to" line naming his new beneficiary. The insured had, however, informed a clerk of his intent to make the change of beneficiary to include his new wife, but the clerk had failed to do so before the insured's death. An examination of the totality of the evidence lead the court to conclude that the insured intended to make the change of beneficiary and that he had substantially complied with the procedures required to do so. Id. at 567-68. Accordingly, it awarded the benefits to the new beneficiary who had not been named on the change of beneficiary form. Id.

C. Sufficiency of the Evidence

In this case, an analysis of the facts leads the Court to conclude that Mr. Montgomery substantially complied with the requirements necessary to effectuate a change of beneficiary. Mr. Montgomery contacted the plan and requested the change of beneficiary form. He then returned the partially completed form, neglecting only to sign it. Mr. Montgomery was deprived of the opportunity to sign the form only because the plan's Service Center failed to return it to him for completion, in contravention of its standard policy to do so upon the receipt of unsigned forms. Instead, the Service Center filed the unsigned form as an effective change of beneficiary.[1]

---

[1] Mr. McMath also presents evidence that Mr. Montgomery may have participated in Bank of America s Benefits Line program which allows individual to make account changes,

The Court finds that Mr. Montgomery's submission of the unsigned form with Mr. McMath's name as the new beneficiary is highly indicative of Mr. Montgomery's intent. Furthermore, the parties opposing the change of beneficiary present no evidence that Mr. Montgomery did not intend to change his beneficiary or that he did not personally complete the change of beneficiary form. Thus, no reasonable finder of fact could hold other than that Mr. Montgomery both intended to effectuate a change of beneficiary and that he attempted to comply with all the requirements to do so. Under federal common law, these actions constitute substantial compliance.

In assessing the circumstances of this case, the Court cannot find that any issues of material fact exist which make this motion inappropriate for decision on summary judgment. There is no genuine dispute that Mr. Montgomery substantially complied with the procedures necessary to name Mr. McMath as his primary beneficiary. As Mr. Montgomery did so, there can be no contention that the Plan acted arbitrarily in awarding the benefits to Mr. McMath.

III. CONCLUSION

The Court finds that the Bank of America Administrative Committee was not arbitrary and capricious in

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including beneficiary changes, over the phone. No party, however, has affirmatively demonstrated that Mr. Montgomery was enrolled in this service or used it to effectuate a change of beneficiary. Accordingly, it is not relevant to the Court's ultimate decision.

holding that Mr. Montgomery named Alexander McMath as his primary beneficiary for the 401(k) plan. Accordingly, the Court GRANTS Alexander McMath's motion for summary judgment and DENIES the summary judgment motion brought by Alva Montgomery, Patsy Patterson, and the estate of Clarence Montgomery.

IT IS SO ORDERED.

Dated: 7/20/98

/s/_____
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed July 20, 1998]

No. C 97-3242 CRB

BANKAMERICA PENSION PLAN, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
ALEXANDER S. MCMATH, et al.,	)
Defendants.	)
	)

JUDGMENT

The Court having granted defendant Alexander McMath's motion for summary judgment and having denied the summary judgment motion made by defendants Alva Montgomery, Pasty Patterson, and the estate of Clarence C. Montgomery by Order dated July 20, 1998, it is hereby ordered that Judgment be entered in favor of defendant McMath and against defendant Montgomery, et al.

IT IS SO ORDERED.

Dated: 7- 20-98 /s/_____
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed May 16, 2000]

No. 98-16543

BANKAMERICA PENSION PLAN, an employee benefit plan; BANKAMERICA 401(K) INVESTMENT PLAN, an employee benefit plan,
Plaintiffs,
v.

ALEXANDER S. MCMATH, an individual,
Defendant-Appellee,
v.

ALVA M. MONTGOMERY, an individual; PATSY PATTERSON, an individual; and THE ESTATE OF CLARENCE C. MONTGOMERY,
Defendants-Appellants.

ORDER

Before: SNEED, PREGERSON, and W. FLETCHER, Circuit Judges

The panel has voted to deny the petition for rehearing. Judge Pregerson and Judge W. Fletcher vote to reject the suggestion for rehearing en banc, and Judge Sneed so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
SEP 13 2000
CLERK

(2)

No. 00-243

IN THE
SUPREME COURT OF THE UNITED STATES

Alexander S. McMath, an individual,
Petitioner,

v.

Alva M. Montgomery, an individual;
Patsy Patterson, an individual, and
The Estate of Clarence H. Montgomery,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Attorneys for Respondents
Alva M. Montgomery
Patsy Patterson and
The Estate of Clarence H. Montgomery

PARTIES TO THE PROCEEDING

Petitioners incorrectly list the respondents to this petition. They are Alva M. Montgomery, an individual; Patsy Patterson, an individual; and the Estate of Clarence H. Montgomery, acting by and through its duly appointed representative, Alva M. Montgomery.

The Estate of Clarence C. Montgomery did not join in the appeal to the Ninth Circuit Court of Appeals and is not a respondent to Mr. McMath's petition for a writ of certiorari.

Respondents have no corporate affiliations.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Cited Authorities iii

Reasons for Denying the Writ 1

I. THIS COURT HAS ADEQUATELY ADDRESSED ERISA PREEMPTION 2

II. THE NINTH CIRCUIT FAITHFULLY FOLLOWED THIS COURT'S ERISA PREEMPTION DECISIONS 4

III. THERE IS NO TRUE CONFLICT BETWEEN THE CIRCUITS 5

Conclusion 7

TABLE OF CITED AUTHORITIES

Page

Cases:

Boggs v. Boggs, 520 U.S. 833 (1997) 1, 3

California Div. of Labor Standards Enforcement v. Dillingham Const. N.A., Inc., 519 U.S. 316 (1997) 1, 3

De Buono v. NYSA-ILA Medical and Clinical Services Fund, 420 U.S. 806 (1997) 1-3

Kentucky Association of Health Plans v. Nichols, 2000 FED App. 0304P (6th Cir. Sept. 7, 2000) 6

McMillan v. Parrot, 913 F.2d 310 (6th Cir. 1990) 5

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) . 1-3, 5, 6

Phoenix Mutual Life Ins. Co. v. Adams, 30 F.3d 554 (4th Cir. 1994) 5

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 1

Statutes:

29 U.S.C. 1144(a) 2

REASONS FOR DENYING THE WRIT

Most simply, Mr. McMath's petition for a writ of certiorari should be denied because this Court has already addressed the core issue that his petition presents: under what circumstances will state laws be preempted by the Employee Retirement Income Security Act (ERISA). That core issued was raised, analyzed and resolved by this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

Two years later, in its 1997 term, this Court decided three more ERISA preemption cases, applying the standards set forth in *Travelers* to specific state laws and providing further guidance on when ERISA preemption may arise. *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 420 U.S. 806 (1997); *Boggs v. Boggs*, 520 U.S. 833 (1997); and *California Div. of Labor Standards Enforcement v. Dillingham Const. N.A., Inc.*, 519 U.S. 316 (1997). And in all of these cases, the Court emphasized the strong "starting presumption that Congress does not intend to supplant state law."

In the years before *Travelers*, this presumption was notably absent, and the various federal appellate courts found that all state laws that had any relation to an ERISA plan were preempted. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). It is accordingly hardly surprising that preemption cases that were decided before this Court's decision in *Travelers* would conflict with those decided after *Travelers*. Yet that unsurprising "conflict" provides petitioner's only justification for seeking a writ.

As the Fourth and Sixth Circuits address new preemption cases under the guidelines set forth in *Travelers* and its progeny, the purported conflict between the circuits will disappear. The grant of petitioner's request writ will not speed that process.

The Ninth Circuit's ruling in this matter was proper in all respects, and faithfully adhered to this Court's pronouncements on ERISA preemption. We accordingly respectfully ask that this Honorable Court deny the Petition for a Writ of Certiorari.

I.

THIS COURT HAS ADEQUATELY ADDRESSED ERISA PREEMPTION

Often, petitioners approach this Court and ask that their cases be heard, so that long neglected legal issues can be analyzed and decided. Here, however, there can be no such claims of neglect, for few issues in the last several years have received more attention from this Court than the issue of ERISA preemption. Indeed, in *De Buono*, the Court noted in its first footnote that ERISA preemption had consumed considerable attention from the Court, and had resulted in no fewer than thirteen decisions. 420 U.S. 806 at fn. 1.

Chief among those decisions was *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). For in that decision, the Court directly tackled the core issued that had befuddled so many lower courts: when does a state law "relate to" an employee benefit plan?

In enacting ERISA, Congress wrote that its provisions would "supersede any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. 1144(a). But, as this Court observed in *Travelers*, ultimately every law intertwines and "relates" to every other law, and clearly Congress did not intend such universal obliteration of state law. Accordingly, in *Travelers*, this Court delved into the legislative history in its efforts to glean the appropriate reach of ERISA preemption. And it found that in

drafting the ERISA preemption clause, Congress was primarily concerned that plan administrators not face conflicting directives for reporting, disclosure, fiduciary responsibility and the like. 514 U.S. at 660-661. Absent either direct or indirect intrusion into these plan duties, the Court concluded, the starting presumption should be that a state law is valid.

Following *Travelers*, this Court again addressed the preemption issues in *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 420 U.S. 806 (1997), *Boggs v. Boggs*, 520 U.S. 833 (1997), and *California Div. of Labor Standards Enforcement v. Dillingham Const. N.A., Inc.*, 519 U.S. 316 (1997). Each decision cemented the *Travelers* analysis, and confirmed the "starting presumption that Congress does not intend to supplant state law."

Because the settings in which ERISA preemption issues may arise are so numerous, even if it wanted to this Court would not have time to review every state law that some litigant felt was supplanted by ERISA. Rather, by articulating the principles of ERISA preemption, this Court has set the standards that will, in time, lead to uniform treatment by the lower appellate courts.

Moreover, as we discuss below, the Ninth Circuit carefully adhered to this Court's preemption decisions. In contrast, the supposedly "conflicting" preemption decisions from the Fourth and Sixth Circuits pre-dated *Travelers* and its progeny. When those circuits next address the issue, they will undoubtedly be guided by this Court's pronouncements, and the conflicts petitioner complains of will disappear.

II.

THE NINTH CIRCUIT FAITHFULLY FOLLOWED THIS COURT'S ERISA PREEMPTION DECISIONS

In his petition for a writ of certiorari, Mr. McMath argues that the Ninth Circuit failed to properly analyze the ERISA preemption issue in this case, because it supposedly failed to look to the "objectives of the ERISA statute as a guide to the scope of state law that Congress understood would survive." *Petition,* at p. 11. Mr. McMath is wrong.

Rather, after carefully reviewing this Court's pronouncements on ERISA preemption, the Ninth Circuit directly addressed the need to analyze Congress' objectives in enacting ERISA. As the Ninth Circuit wrote:

> To determine the existence of a forbidden connection, we "must go beyond the unhelpful text and the frustrating difficulty of defining its key term ['relate to'], and look instead to both the objectives of the ERISA statute as a guide to the scope of the state law the Congress understood would survive," and "the nature of the effect of the state law on ERISA plans." [Citations.] This approach closely resembles the approach taken in *Peckham*, 964 F.2d at 1052, where the court looked to the ERISA statute and found that the doctrine of substantial compliance did not frustrate any of its objectives. Therefore, we find this approach persuasive.

Petition at pp. 16a to 17a.

Nor is petitioner correct that the Ninth Circuit's decision in this case will place plan administrators under conflicting regulation--the primary vice that Congress wished to avoid. For regardless of whether one applies the forum state's substantial compliance rules, or instead creates and follows a federal common law standard, there is only one rule that a plan administrator must apply.

This case thus does not present a situation where ERISA demands one action, but a state law requires another. And it does not present a state law that was intended to apply just to ERISA, or even a state law that disproportionately affects ERISA plans. Instead, this case presents precisely the sort of state law that under *Travelers* and its progeny survives ERISA preemption.

III.

THERE IS NO TRUE CONFLICT BETWEEN THE CIRCUITS

Equally incorrect is Mr. McMath's claim that this Court must resolve a conflict between the Ninth and Tenth Circuits on the one hand, and the Fourth and Sixth Circuits on the other.

It is true that the Fourth and Sixth Circuits have found that ERISA does indeed preempt state substantial compliance doctrines. But both courts reached that result before *Travelers*. And both courts found preemption by observing that substantial compliance rules "relate to" ERISA — in the broad sense of relation that *Travelers* explicitly denounced. *See McMillan v. Parrot*, 913 F.2d 310 (6th Cir. 1990); *Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994).

Of course, whenever this Court announces a new legal standard, there will for a short period be a conflict between those circuits who have not yet had occasion to adopt the new standard in a published decision and those who have. But that is hardly the sort of "conflict" that justifies the grant of a writ of certiorari. For if it were, this Court would always be burdened with the need for multiple decisions on the same core issue.

Indeed, the Sixth Circuit has already recognized that under *Travelers*, it must revise its preemption analysis. Thus, while suggesting that *Travelers* might not represent the vast sea change that some academic commentators had asserted, the Sixth Circuit in *Kentucky Association of Health Plans v. Nichols*, 2000 FED App. 0304P (6th Cir. Sept. 7, 2000) explicitly recognized that *Travelers* required a new approach to determining when a state law "relates to" ERISA. It has now applied that new standard, and in the process has helped erase the "conflict" that petitioner sees.

Undoubtedly, when it next addresses the issue, the Fourth Circuit will also revise its approach.

The grant of Mr. McMath's petition would thus serve no valid end. The Court has already addressed the preemption doctrines that apply to this case, the Ninth Circuit faithfully, carefully and correctly applied those doctrines, and there is no true conflict with any other post *Travelers* decision.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny Mr. McMath's petition for a writ of certiorari.

Respectfully submitted,

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No. 00-243

IN THE
SUPREME COURT OF THE UNITED STATES

Alexander S. McMath, an individual,
Petitioner,

v.

Alva M. Montgomery, an individual;
Patsy Patterson, an individual, and
The Estate of Clarence C. Montgomery,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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7pp

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Petitioner's Reply Brief 1

Preliminary Statement 1

The Fifth Circuit Joins the Conflict 1

Conclusion 3

TABLE OF AUTHORITIES

Cases:

Continental Assurance Co. v. Coombes,
2000 U.S. Dist. LEXIS 810 (2000) 2

Fortis Benefits Ins. Co. v. Johnson,
966 F.Supp. 987 (D.C. Nev. 1997),
affirmed, 152 F.3d 925
(9th Cir. Nev. 1998) 1

Manning v. Hayes,
212 F.3d 866 (5th Cir. Tex. 2000) 1, 2

McMillan v. Parrot,
913 F.2d 310 (6th Cir. 1990) 1, 2

*New York State Conference of Blue Cross &
Blue Shield Plans v. Travelers Ins. Co.*,
514 U.S. 645 (1995) 1

Phoenix Mutual Life Ins. Co. v. Adams,
30 F.3d 554 (4th Cir. 1994) 1

Statutes and Rules:

29 U.S.C. 1144(a) 1

S.C. Rule 10.1(a) 3

PETITIONER'S REPLY BRIEF

Petitioner Alexander S. McMath files the following Reply Brief in response to Respondent's Brief in Opposition:

Preliminary Statement

Respondent would argue that this Court's decision, in *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645 (1995), effectively foreclosed further conflict between and among the circuits over the issue of preemption of state substantial compliance rules under 29 U. S. C. § 1144 (a) , arguing that the Fourth and Tenth Circuits' decisions in *McMillan v. Parrot*, 913 F.2d 310 (6th Cir. 1990) and *Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994), predated *Travelers*, and the prospect of further conflict is nonexistent. Pgs. 5-6. Respondent's Opposition (undated).

As a factual matter, the circuit conflict has continued post-*Travelers*, as cited in the Petition, and was recently exacerbated by the Fifth Circuit's entry into the conflict as represented in the recent holding in *Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. Tex. 2000).

The Fifth Circuit Joins the Conflict

In response to the Respondent's argument that the conflict between and among the circuits over the preemption of state substantial compliance rules ended with *Traveler's*, it must be pointed out that the Ninth Circuit's decision in *Fortis Benefits Ins. Co. v. Johnson*, 966 F.Supp. 987 (D.C. Nev. 1997), *affirmed*, 152 F.3d 925 (9th Cir. Nev. 1998), was post-*Traveler's*, and was subsequently cited with approval by the Seventh Circuit's Northern District Court for the Eastern

Division in *Continental Assur. Co. v. Coombes*, 2000 U.S. Dist. LEXIS 810 (Nos. 98-C-1153, 98-C-4771, 98-C-7186) for the proposition that "ERISA preempts the state doctrine of substantial compliance." Pg. 6, 2000 U.S. Dist. LEXIS 810.

And, more to the point, the conflict is continuing. In the recent holding by the Fifth Circuit in *Manning v. Hayes*, *supra*, the Fifth Circuit was confronted with an ERISA beneficiary designation dispute requiring interpretation of Texas state law governing changes of beneficiaries and stated as follows:

> There is no doubt that Manning's claim on behalf of the estate is preempted, to the extent that it relies upon the Texas beneficiary redesignation statute. Almost every circuit court to consider the issue, including this one, has determined that a state law governing the designation of an ERISA beneficiary "relates to" the ERISA plan, and is therefore preempted. See: *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994), see also: *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857, 862 (4th Cir. 1998); *Mohamed v Kerr*, 53 F.3d 911, 913 (8th Cir. 1995); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 15 (2nd Cir. 1993); *Metropolitan Life Ins. Co. v. Hanslip*, 9349 F.2d 904, 906 (10th Cir. 1991); *Brown v. Connecticut General Life Ins. Co.*, 934 F.2d 1193, 1195 (11th Cir. 1991); *McMillan v. Parrot*, 913 F.2d 310, 311 (6th Cir. 1990); *Fox Valley & Vicinity Const. Workers Pension Fund*, 897 F.2d 275, 278

(7th Cir. 1989). But see: *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 961 (9th Cir, 1998) (holding that ERISA does not preempt California construction trust or community property law in a dispute between a surviving and former spouse over life insurance benefits), *cert. denied sub nom.* 525 U.S. 1222, 119 S.Ct. 903, 142 L.Ed.2d 902 (1999) *Ibid.* at 870.

CONCLUSION

Accordingly, in view of the vigorous conflict that continues to pertain among and between the circuits respecting the preemption of state substantial compliance/ beneficiary designation laws, it cannot be contended, that the Ninth Circuit's decision is not a "decision in conflict with the decision of another United States Court of Appeals on the same matter." S.C. Rule 10.1(a). And, for the foregoing reason, therefore, this petition for writ of certiorari should be granted.

Dated: September 21, 2000

Respectfully submitted,

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